# PAYMENT METHODOLOGY AND GAMING DEVICE LICENSING UNDER COMPACT SECTION 4.3.2.2

## INTRODUCTION

The Indian Gaming Regulatory Act enacted by the Congress in 1988 (P.L. 100-497; hereafter IGRA) establishes a mechanism by which federally recognized Indian Tribes may be authorized to conduct class III gaming activities[1] in accordance with compacts negotiated with the states (see 25 U.S.C. sec. 2710(d)).

Commencing in September of 1999, the State entered into currently effective Compacts with 62 federally recognized tribes providing for class III gaming. Notice of approval of 60 of these Compacts by the Secretary of Interior was published in the Federal Register on May 16, 2000. The notices of approval for Compacts of two additional Tribes were published on July 6, 2000, and October 19, 2000, respectively. Under Section 11.0 of the Compacts, they became effective on the publication of the notice of approval in the Federal Register.

Section 4.3.2.2 of the Compacts provides for issuance of gaming device[2] licenses in excess of the number otherwise permitted by Compact section 4.3.1 through a draw process specifying certain priorities.[3] The necessity for

---

[1] The distinctions between class I, II, and III gaming are set forth at 25 U.S.C. section 2703, subsections (1), (2), and (3).

[2] "Gaming device" is defined by Section 2.6 of the Compacts to mean ". . . a slot machine, including an electronic, electromechanical, electrical, or video device that, for consideration, permits: individual play with or against that device or the participation in any electronic, electromechanical, electrical, or video system to which that device is connected; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the application of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith."

[3] The priorities are set forth in Compact section 4.3.2.2(a)(3)(i)-(vi), as follows:

*"(i) First, Compact Tribes with no Existing Devices (i.e., the number of Gaming Devices operated by a Compact Tribe as of September 1, 1999) may draw up to 150 licenses for a total of 500 Gaming Devices;*

these priorities stems from another provision of Compact section 4.3.2.2 that imposes a statewide maximum on the number of gaming device licenses that may be issued to all compacted tribes in the aggregate.

Compact section 4.3.2.2 also requires the payment of a "non-refundable one-time prepayment fee in the amount of $1,250 per Gaming Device being licensed" and payment in quarterly installments of annual contributions to the (Indian Gaming) Revenue Sharing Trust Fund, as determined in accordance with the schedule in Compact section 4.3.2.2(a)(2), to "acquire and maintain" gaming device licenses.

Almost before the ink was dry on the Compacts, there emerged differing interpretations of the above-described provisions of Compact section 4.3.2.2. In late 1999 there arose a public difference of opinion between William Norris, Special Counsel to the Governor for Tribal Affairs, and the Legislative Analyst concerning the limit on the number of total gaming

---

*"(ii) Next, Compact Tribes authorized under Section 4.3.1 to operate up to and including 500 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (i)), may draw up to an additional 500 licenses, to a total of 1000 Gaming Devices;* (cont. next page)

*"(iii) Next, Compact Tribes operating between 501 and 1000 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (ii)), shall be entitled to draw up to an additional 750 Gaming Devices;*

*"(iv) Next, Compact Tribes authorized to operate up to and including 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iii)), shall be entitled to draw up to an additional 500 licenses, for a total authorization to operate up to 2000 gaming devices.*

*"(v) Next, Compact Tribes authorized to operate more than 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iv))., shall be entitled to draw additional licenses up to a total authorization to operate up to 2000 gaming devices.*

*"(vi). After the first round of draws, a second and subsequent round(s) shall be conducted utilizing the same order of priority as set forth above. Rounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs."*

devices authorized for all Tribes by the Compacts. Subsequently, various Tribes and tribal organizations have urged their own numbers.

In a letter to Michael Sides, CPA, dated May 9, 2000, William Norris and Chief Deputy Attorney General Peter Siggins acknowledged with approval the conduct of the gaming device license draws by Sides on behalf of the tribes, subject to the limitations on maximum numbers in the Compact. That letter calculated 15,400 as the maximum number of licenses that Sides could then issue under the Compacts. Records later obtained from Sides show that on May 15, 2000, less than a week following the date of the State's letter and one day before the effective date of the Compacts, Sides conducted a draw and issued 26,915 gaming device licenses to 35 compacted tribes.

The Sides draws were conducted pursuant to individual agreements between Sides Accountancy Corporation and 39 Tribes. Prior to March of 2001 Sides issued a total of 29,398 gaming device licenses. By letter dated February 6, 2001, Sides' attorney advised the California Gambling Control Commission that Sides had no authority or responsibility to assure that the draws he had conducted complied with the Compacts. Because authority for the gaming device license draws derives from the Compacts, this letter drew into question the legitimacy of the gaming device licenses issued by Sides.

In response, the Governor's Chief Deputy Legal Affairs Secretary Shelleyanne Chang and Chief Deputy Attorney General Peter Siggins, by letter dated March 16, 2001, directed Sides not to conduct further draws and to remit records of prior draws to the Commission. In addition, the Governor adopted Executive Order D-31-01 on March 8, 2001, stating that the California Gambling Control Commission ". . . must control and monitor the gaming device licensing processes on a continuing basis . . ." and directing the Commission to administer the gaming device license process and to ". . . ensure that the allocation of machines among California Indian Tribes does not exceed allowable number of machines as provided in the Compacts . . . ."

Additionally, the staff of the California Gambling Control Commission reported to the Commission in May of 2001, that there were at least six different payment methodologies being used by the compacted tribes in making payments under Compact section 4.3.2.2 to the (Indian Gaming) Revenue Sharing Trust Fund.

The differences of interpretation of Compact section 4.3.2.2 have not been restricted to differences between the Tribes and the State, but additionally have reflected a lack of unanimity of opinion among the 62 compacted tribes and among the noncompact tribes that are the beneficiaries of the moneys in the (Indian Gaming) Revenue Sharing Trust Fund. Lack of consensus as to the meaning of the Compact language has resulted in an inability to provide for uniform administration of these Compact provisions, as well as concomitant tension in the intergovernmental relationship between each Tribe and the State that the Compacts were intended to foster.

In order to discuss and to determine the prevalence of views among the Tribes, and better understand the reasoning underlying varying interpretations of Compact section 4.3.2.2, the Commission scheduled a series of eight meetings throughout the State between representatives of the Commission and the compacted Tribes during February and March of 2002. Four of these meetings were devoted to issues respecting payment methodology and the other four considered licensing issues.

## PRINCIPLES APPLICABLE TO COMPACT INTERPRETATION

As stated by the Tenth Circuit Court of Appeals in *Pueblo of Santa Ana* v. *Kelly* (10th Cir. 1997) 104 F.3d 1546, 1556), a compact is a form of contract. The use of compacts to establish class III gaming rights was intended by Congress to strike a balance between the interests of tribes and of states in class III gaming, for Congress could have permitted Indian tribes to conduct any kind of gaming on Indian lands without any involvement by states (Id., at 1555). The language of the Compacts is to be construed in accordance with the ordinary principles applicable to interpretation of contracts (see *State* v. *Oneida Indian Nation of New York* (N.D.N.Y. 1999) 78 F.Supp.2d 49, 61).

Some of the Tribe's representatives have urged that all ambiguities in the Compacts be construed against the State on the basis of the so-called Indian canon of construction applicable to interpretation of federal statutes, which holds that ambiguous provisions of federal statutes should be interpreted to the benefit of Indians (see e.g., *Montana* v. *Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 766; cf., *Bryan* v. *Itasca County* (1976) 426 U.S. 373, 392). No reported judicial decision has, however, applied the canon to the interpretation of a tribal-state gaming compact, which, as contrasted with a statute, is consensual and subject to a specific requirement for good-faith

negotiation (25 U.S.C. sec. 2710(d)(3)). Thus, neither decisional law nor logic compel or suggest the use of the Indian canon in interpreting tribal-state class III gaming compacts.

It has also been suggested that the State should be regarded as having drafted the Compacts and that the rule of interpretation should be applied that construes ambiguities against the party that drafted the instrument being interpreted. Generally this rule is employed only when none of the other canons of construction succeed in dispelling uncertainty (see Civ. C. § 1654; *Oceanside 84, Ltd.* v. *Fidelity Fed. Bank* (1997) 56 Cal.App.4th 1441, 1448). Moreover, application of the rule is usually limited to the construction of form contracts, such as contracts of insurance. Discussions with individuals who participated in the 1999 Compact negotiations, however, indicate that tribal attorneys and the State's representatives each participated in the drafting the Compact language, although not necessarily the same portions of the language.

Additionally, each tribe was given an opportunity to request changes in its Compact that differ from the uniform compact. These changes are shown at the back of each Compact. Under Section 15.4 of the compacts, any compacted tribe is entitled to substitution of the terms of another Tribe's Compact, where there are more favorable provisions in the other Tribe's Compact. Thus, the factual circumstances under which the Compacts were negotiated do not suggest application of the canon of interpretation that provides for construction of ambiguities against the drafter.

The role of the California Gambling Control Commission as the trustee named in the Compacts for the receipt, deposit, and distribution of monies paid to the (Indian Gaming) Revenue Sharing Trust Fund (Compact section 4.3.2(a)(ii)) has been cited by some tribal representatives as requiring the Commission to interpret the Compact language so as to produce the greatest benefit (payments) to the Non-Compact Tribes. However, although the Commission is referred to in the Compacts as a trustee, the Compacts are not conventional trust instruments, but rather an implementation under IGRA of the terms of class III gaming by compacted Indian Tribes in California.

Moreover, the Compacts specifically provide that the Commission has no discretion as to the use or disbursement of the funds in the (Indian Gaming) Revenue Sharing Trust Fund, which, in any event, is subject to any conditions imposed by the California Legislature in appropriating the funds

for disbursement in implementation of the Compacts. The Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust. Because Compacts impose no express duty upon the Commission to interpret the Compacts so as to maximize the payments made by "Compact Tribes" to the "Non-Compact Tribes" (see Compact sec. 4.3.2(a)(i)), there is no legal basis upon which the Commission could justify such a bias. Interpretation of these provisions of the Compacts must be guided by the same principles that apply to construction of other Compact provisions.

Commission staff observes that, unlike enacted legislation, there are no reliable alternative indicia of intent available to explain ambiguous provisions of the Compacts. Also, while participants in the drafting process have recollections, a helpful consensus of opinion is lacking. The Commission is accordingly left to make what it can of the language used.

Because each compacted tribe, as a sovereign party to its Compact, must also interpret for itself the respective rights and obligations under its Compact, the Commission conducted eight meetings throughout the state to obtain insight into the various tribal perspectives on payment methodology and licensing under Section 4.3.2.2 of the Compacts. Although this process has been time consuming, the Commission believed it to be necessary to fully understand the implications of the various interpretive alternatives, and in order to promote cooperation in the implementation of the Compacts.

Finally, the ultimate object of interpretation is to ascertain objective intent. In so doing, we are not permitted to omit language that was included or to insert language that was omitted in order to conform to an assumed intent (cf. *Cabazon* v. *Wilson* (9th Cir. 1997) 124 F.3d 1050, 1060). We must take the Compact language as it was written.

Where the language of the Compact is equally susceptible to two or more interpretations, Commission staff have given general preference in the following order of priority, as applicable: to the interpretation that is most consistent with the overall scheme of the Compacts, pursuant to the rule of construction that subordinates particular provisions to general intent (see e.g., Cal. Civil Code § 1650); to the interpretation favored by all or nearly all compacted tribes that participated in the aforementioned workshops; and, with respect to provisions imposing payment obligations, to the

interpretation that resolves any substantial doubts concerning intent in favor of those obligated to make the payments.

PAYMENT METHODOLOGY

*Graduated v. Tiered*

The table in Compact section 4.3.2.2(a)(2) sets forth the amounts of annual gaming device license payments to the Revenue Sharing Trust Fund, as follows:

*"(2) The Tribe may acquire and maintain a license to operate a Gaming Device by paying into the Revenue Sharing Trust Fund, on a quarterly basis, in the following amounts:*

| *Number of Licensed Devices* | *Fee Per Device Per Annum* |
|---|---|
| *1-350* | *$0* |
| *351-750* | *$900* |
| *751-1250* | *$1950* |
| *1251-2000* | *$4350"* |

Unlike the table in Compact section 5.1(a), the above table does not specify whether it is intended to specify a single payment amount for all of a Tribe's gaming devices (graduated method) or is instead intended to make the first 350 subject to no fee, the next 350 subject to a fee of $900, and so on (tiered method).

The tribal representatives who commented in and following the workshops on payment methodology were unanimous in supporting the tiered approach. Staff believes that nothing in the Compacts warrants the Commission taking a contrary view.

Recommendation: The Commission adopt, as its policy, the tiered interpretation of the table in Compact section 4.3.2.2(a)(2).

*Are each Tribe's first 350 licensed devices subject to payments under the table in Compact section 4.3.2.2(a)(2)?*

There is an ambiguity resulting from an apparent conflict between the heading of the left column of the table in Compact section 4.3.2.2(a)(2) and the bottom row of that column. The heading of the column reads "Number of licensed devices," but the bottom row of the table goes up to 2,000. Under the Compacts, no Tribe could have more than 1,650 "licensed" devices (see Compact §§ 4.3 & 4.3.2.2(a)). The number 2,000 reflects the maximum number of all gaming devices, licensed and unlicensed, that may be operated by a Tribe (Compact § 4.3.2.2(a)).

Commission staff notes that, the first tier in the table corresponds numerically to the 350 unlicensed gaming devices available under Compact section 4.3.1(b). It could be argued that this provides support for applying the table to unlicensed as well as licensed gaming devices. However, this logic does not apply to the numbers of unlicensed "grandfathered" gaming devices under Compact section 4.3.1(a).

All but one of the tribal representatives who commented in and following the workshops on payment methodology stated the view that the heading of the table in Compact section 4.3.2.2(a)(2) should prevail over the conflicting implication created by the bottom row going up to 2,000. A representative of one uncompacted Tribe at the San Diego workshop disagreed stating that the issue should be resolved so as to maximize payments to the (Indian Gaming) Revenue Sharing Trust Fund.[4]

Because there was unanimity among the tribal representatives of the compacted tribes and because Commission staff believes that payment obligations should not be increased based upon mere conjecture concerning intent, staff endorses the interpretation that the left column of the table in Compact section 4.3.2.2(a)(2) refers only to licensed gaming devices. From this interpretation it follows that the first 350 licensed devices are exempt from payment of any fee into the Revenue Sharing Trust Fund.

---

[4] Because maximization of payments to the (Indian Gaming) Revenue Sharing Trust Fund increases payments received by the Non-Compact Tribes, it may be assumed that this view would represent the prevailing view among those tribes.

Recommendation: The Commission adopt, as its policy, the interpretation that the table in Compact section 4.3.2.2(a)(2) applies only to licensed devices, as indicated by the heading of the left column, and that, in consequence, the first 350 licensed devices are exempt from any payment into the Revenue Sharing Trust Fund.

*Does the obligation to make quarterly payments to the (Indian Gaming) Revenue Sharing Trust Fund commence when the gaming device license is drawn or when the licensed gaming device are put into operation?*

The operative language in Compact section 4.3.2.2(a)(2) is that "[t]he Tribe may acquire and maintain a license to operate a Gaming Device by paying into the Revenue Sharing Trust Fund, on a quarterly basis . . ." The plain meaning of this language is that the quarterly payments are in exchange for acquiring and maintaining "a license to operate a Gaming Device" rather than operation of the gaming device.

Thus, there is no apparent ambiguity in the operative language of Compact section 4.3.2.2(a)(2). However, there was nevertheless a significant split among the Tribes on this issue.

The argument made for ignoring the plain meaning of this Compact provision is that payments to the (Indian Gaming) Revenue Sharing Trust Fund are intended to be revenues, and there are no revenues until the gaming devices are put into operation. Arguably initiation of payment obligations to the Revenue Sharing Trust Fund concurrently with receipt of gaming device revenues would be good policy, but, in the view of Commission staff, such a policy finds no expression in the language of the Compacts.

One Tribe indicated its view that there is a linkage between this issue and the issue of whether the $1,250 "non-refundable one-time pre-payment fee" of Compact section 4.3.2.2(e) is to be credited against quarterly payments to the (Indian Gaming) Revenue Sharing Trust Fund.

Commission staff is of the view that, if the Compact had intended payments to the (Indian Gaming) Revenue Sharing Trust Fund to be revenue dependent, that intent would have been expressed either explicitly or by making the payments proportional to revenues as was done in Compact section 5.1 (Special Distribution Fund).

Several Tribes submitted written opinion that the draws conducted by Sides Accountancy Corporation were not valid and that, accordingly, the obligation to make quarterly payments to the (Indian Gaming) Revenue Sharing Trust Fund should not begin until valid licenses are issued by the Commission or earlier, as a matter of equity, when the gaming devices are put into operation. Regardless of the invalidity of the Sides process, it is the view of Commission staff that those tribes which obtained revenue from the use of putative gaming device licenses drawn in the Sides process are obligated under the Compacts to make payments to the Revenue Sharing Trust Fund as provided in Compact section 4.3.2.2(a)(2). It is a general principle of contract law that voluntary acceptance of the benefit of a transaction constitutes consent to the obligations arising from the transaction (see e.g., Cal, Civil Code secs. 1589 and 3521). By obtaining the benefit of the revenues produced by gaming devices for which licenses are required under the Compact, these tribes committed themselves to the commensurate obligation of making payments to the (Indian Gaming) Revenue Sharing Trust Fund.

Commission staff recommends that, except for unused Sides "licenses" voluntarily surrendered when the Commission issues validating gaming device licenses (see discussion below), all payment obligations apply to the same extent as if the Sides "licenses" had been issued in draws conducted by the Commission.

Recommendation: The Commission adopt, as its policy, the interpretation of Compact section 4.3.2.2(a)(2) that the obligation to make quarterly payments to the (Indian Gaming) Revenue Sharing Trust fund commences when the gaming device license is drawn.

*Does Compact section 4.3.2.2(a)(2) provide for payments on a calendar-quarter basis or every three months from the date the gaming device license is drawn?*

Although not all Tribes have made quarterly payments to the (Indian Gaming) Revenue Sharing Trust Fund using calendar quarters, only one Tribe expressed opposition to using calendar quarters. Of those tribal representatives commenting, most indicated that the payment for the first calendar quarter should be prorated.

Establishing payment schedules based upon calendar quarters is consistent with the Compact language and affords convenience to both the Tribes and

the Commission. The most logical way to address the initial partial quarter is through proration.

Recommendation: The Commission adopt, as its policy, the interpretation of Compact section 4.3.2.2(a)(2) that payments to the (Indian Gaming) Revenue Sharing Trust Fund under those provisions are payable on a calendar-quarter basis, and that the payment for the initial quarter is prorated for the amount of time the gaming device license is in effect during that calendar quarter.

*Is the $1,250 payment required by Compact section 4.3.2.2(e) a prepayment of the sums required by Compact section 4.3.2.2(a)(2) to be remitted quarterly to the (Indian Gaming) Revenue Sharing Trust Fund?*

Compact section 4.3.2.2(e) reads as follows:

*"(e) As a condition of acquiring licenses to operate Gaming Devices, a non-refundable one-time pre-payment fee shall be required in the amount of $1,250 per Gaming Device being licensed, which fees shall be deposited in the Revenue Sharing Trust Fund. The license for any Gaming Device shall be canceled if the Gaming Device authorized by the license is not in commercial operation within twelve months of issuance of the license."*

There is nothing in the Compacts that expressly requires payments under these provisions to be credited against quarterly payments under Compact section 4.3.2.2(a)(2). Another argument against interpreting the $1,250 fee as a credit is that it is described as nonrefundable and interpreting the fee as a credit against future payments would make it, in essence, refundable. Additionally, in the case of Tribes that never acquire more than 350 licenses, the fee could never become a credit.

However, the term "pre-payment," in ordinary usage, means payment beforehand or in advance (see e.g., *APP* v. *CLASS* (Ind. 1947) 73 N.E.2d 59). A number of tribes interpret the use of the term to mean that the payment required by Compact section 4.3.2.2(e) is to be credited against quarterly payments required by Compact section 4.3.2.2(a)(2).

Additionally, Compact section 4.3.2.2(a)(2) specifies that the quarterly payments to the Revenue Sharing Trust Fund are to "acquire and maintain a license." These quarterly payments cannot logically be for the purpose of

acquiring a license, unless the fee required by Compact section 4.3.2.2(e) is credited against the quarterly payments.

While Commission staff believes that the probable intent of the drafters of Compact section 4.3.2.2(e) was to establish a separate $1,250 fee for the issuance of a gaming device license, rather than a credit against the quarterly payments required by Compact section 4.3.2.2(a)(2), Commission staff believes that the arguments for the prepayment interpretation are sufficiently persuasive as to create a high level of doubt as to the meaning of the language. Staff is of the view that doubts concerning the interpretation of payment obligations under the Compacts should be resolved in favor of the payers.

The tribal representatives attending the February workshops were split on this issue, there being no clear consensus.

Recommendation: The Commission adopt, as its policy, the interpretation of Compact section 4.3.2.2(e) that payments made pursuant to Compact section 4.3.2.2(e) be credited against quarterly payments required by Compact section 4.3.2.2(a)(2).

LICENSING

Compact section 4.3.2.2 is entitled "Allocation of Licenses." Subsection (a) of Compact section 4.3.2.2 provides a means by which compacted tribes may augment the number of gaming devices authorized to each Tribe under Compact section 4.3.1. Subject to a per-tribe maximum of 2,000 and a limit on the aggregate number of licensed gaming devices statewide, a Tribe may obtain the additional gaming devices in a draw process that provides for allocation in accordance with the priorities set forth in Compact section 4.3.2.2(a)(3).

There is no mystery concerning the purpose of the draw process, which is to implement the priorities of Compact section 4.3.2.2(a)(3) for allocation of gaming device licenses. These priorities are only necessary because of the limit on the total number of gaming devices licensed statewide by all tribes. That limit is determined in accordance with the formula set forth in Compact section 4.3.2.2(a)(1), the language of which has produced disagreement concerning the meaning to be attributed.

Thus, licensing under Compact section 4.3.2.2 is for the sole purpose of implementing allocation of gaming devices among the tribes up to the statewide limit of Compact section 4.3.2.2(a)(1). Importantly, there is nothing in the Compacts which suggests that licensing under these provisions was intended to supplant the regulatory authority of each individual Tribe and its tribal gaming agency over the Tribe's gaming operation and the gaming activities conducted by the Tribe.

Section 6.0 of the Compacts, entitled "Licensing," requires all gaming activities conducted under a Compact to comply with the Tribe's gaming ordinance adopted under the IGRA and with rules, regulations, procedures, specifications, and standards adopted by the Tribal Gaming Agency, as well as requiring that the Tribe's gaming operations be owned solely by the Tribe (Compact sections 6.1 and 6.2).

So understood, the manifest scheme of the Compacts entails two distinct levels of "licensing" of gaming devices that are made available under Compact section 4.3.2.2. Section 2710(d)(5) of Title 25 of the United States Code, a provision of IGRA, specifies that nothing in the IGRA provisions concerning class III gaming compacts "shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by an Tribal-State compact entered into by the Indian tribe . . . ."

It must be acknowledged that Section 4.3.2.2 is in derogation of each Tribe's sovereignty in several important respects. First, each Tribe is limited to a maximum of 2,000 gaming devices and there is a further limitation resulting from application of the statewide limit on gaming device licenses. Additionally, acquiring and maintaining the gaming device licenses requires making the payments to the Revenue Sharing Trust Fund specified in Compact section 4.3.2.2. This scheme removes significant tribal authority for the operation of gaming devices.

The legislative history of IGRA is replete with references to the need to accommodate both tribal and state interests and was intended to encourage tribal and state governments to work together to develop a regulatory and jurisdictional pattern that fosters consistency and uniformity in the manner in which laws regulating the conduct of gaming activity are applied (*Pueblo of Santa Ana* v. *Kelly* (10th Cir. 1997) 104 F.3d 1546, 1554).

*The Ramifications of the Sides "Licensing" Process*

On May 15, 2000, the day before any of the Compacts became effective, Sides Accountancy Corporation held an initial draw for the purpose of allocating gaming device licenses. A draw for 15,400 gaming device licenses was sanctioned by a May 9, 2000, letter to Michael Sides from representatives of the Governor and Attorney General. However, the Sides draw on that date issued 26,915 purported gaming device licenses. Moreover, the terms of Sides' engagements, ultimately with 39 of the 62 compacted tribes, failed to make any provision for limiting the gaming device license pool in accordance with the statewide limit of Compact section 4.3.2.2(a)(1)–or even advising the State of the number of gaming device licenses issued.

A February 6, 2001, letter from Sides' attorney to the Chairman of the California Gambling Control Commission acknowledged that, in conducting gaming device license draws, Sides had no authority or responsibility to assure compliance with the Compacts. Given that the allocation purpose of the draws was thus obviated, it must be concluded that the Sides draw process was inconsistent with the terms of the Compacts, both as to their provisions and purposes. This leaves in doubt the status of the Sides "licenses" and will require clarification.

*Analysis*

The Compacts do not clearly specify the entity or entities under authority of which the gaming device license draws are to be conducted. Some of the Tribes have argued that this means that the Tribes have the authority as an element of retained sovereignty. Other tribes have conceded this authority to the California Gambling Control Commission as named "trustee" of the Revenue Sharing Trust Fund. It has also been suggested by an intertribal organization known as the Tribal Alliance of Sovereign Indian Nations (TASIN) that gaming device license draws be conducted by a proposed "Gaming Device Licensing Board" with majority tribal representation and minority State representation.

In analyzing the various possible ways of interpreting the Compacts to determine where authority resides for conducting the gaming device licensing draws, Commission staff believes that the interpretation is to be preferred that best comports with the objectives of the allocation scheme and

is consistent with the Compact language. Initially, the absence of language in the Compacts creating a multi-tribal body with authority to conduct the draws strongly suggests that none was intended. Nor does the concept of retained sovereignty support the creation of such a body. While each tribe has the attributes of tribal sovereignty, there is no collective or shared sovereignty.[5]

The Compacts create a separate legal relationship between the State and each compacted Tribe. The Compacts do not establish any legal relationship between the Tribes, except with respect to the Association created to review proposed regulations under Section 8.0 of the Compacts. The Association is not given any function under Compact section 4.3.2.2 or any related provision of Section 4.0.

Section 4.3.2.2 of the Compacts clearly envisions a single process for allocation of gaming device licenses. More than one allocating body would result in anarchy and defeat the Compact allocation scheme. Therefore, it is logical to assume that if the Compacts had intended that the tribes conduct the draw process, an intertribal entity for accomplishing that purpose would have been at least referred to in the Compacts.

Additionally, it is observed that limitations on the number of gaming devices that the Tribes may operate, as provided in Compact section 4.3.2.2, are necessarily a limitation of tribal sovereignty. Requiring the tribes to enforce their own reduction of sovereignty is at best counterintuitive. In any contract analysis, the party for whose benefit a provision is included has the power to enforce it.

Some tribal representatives have argued that the State's approval of the Sides licensing process is evidence of intent that the Tribes collectively retain the right to allocate gaming device licenses under Compact section 4.3.2.2. The State's action, however, may also be regarded as a delegation of authority because the California Gambling Control Commission was not in existence when the Compacts became effective. This was, in fact, the characterization given from the bench by Superior Court Judge Joe S. Gray in a December 28, 2001 ruling on the Commission's application for a

---

[5] Giving a multi-tribal body authority to determine the number of gaming devices to be operated by any individual tribe is in derogation of that tribe's ability to game and, hence its sovereignty. Because the gaming tribes compete for patrons, there is moreover a conflict of interest inherent in any multi-tribal licensing body.

temporary restraining order enjoining Sides Accountancy Corp.and its principal from conducting further license draws.

Only 39 of the 62 compacted Tribes entered into an engagement with Sides Accountancy Corp. for license draws. The Sides process, therefore, cannot be regarded as an exercise of any putative collective sovereignty of all compacted tribes. Moreover, it points up the possibility of multiple competing groups of compacted tribes conducting independent gaming device license draw processes, although only a single process is envisioned by the Compacts.

While the Compact does not specifically name an entity to conduct gaming device license draws, Compact section 4.3.2.2(a)(3)(vi) requires notification of the "Trustee" when any Tribe desires a gaming device license draw after their discontinuance. The natural implication of this provision is that the "Trustee" is the party with responsibility for conducting the draws. The California Gambling Control Commission is the only entity referred to in the Compacts as a Trustee for any purpose (see Compact sections 4.3.2(a)(ii) and 4.3.2.1(b)).

The California Attorney General has opined that the California Gambling Control Commission is the entity responsible for conducting the draws under Compact section 4.3.2.2 and the Governor has mandated that the Commission administer the gaming device license draw process in Executive Order D-31-01. Based upon the above analysis, Commission staff is in accord. Nevertheless, Commission staff believes that tribal participation in the gaming device license draw process is desirable to promote transparency of, and confidence in, the process.

Despite the invalidity of the Sides licensing process, Commission staff believes that the tribes participated in good faith. Accordingly, the participating tribes should not be jeopardized by past reliance upon the Sides draw process and are entitled to valid gaming device licenses. Because it is concluded that the Sides draws did not result in the issuance of valid gaming device licenses, the 12-month time limitation of Compact section 4.3.2.2(e) for putting those licenses into commercial operation has not yet commenced. Upon issuance of valid gaming device licenses, the 12-month time limitation of Compact section 4.3.2.2(e) will commence running.

Additionally, because the draws and, hence, the purported licenses issued by Sides were inconsistent with the Compacts, it is the view of staff that tribes that participated in the Sides draws and that acquired Sides licenses which have not been used should have the option of surrendering them and receiving reimbursement for payments made in the form of a credit against future payments under Compact section 4.3.2.2(a)(2) or, if not possible, a refund. Unlike tribes that put gaming devices into operation in reliance on the Sides license draws, any tribe that obtained Sides' purported licenses, but did not place gaming devices in operation under the purported licenses obtained no benefit from them (see discussion above). In the opinion of Commission staff, these tribes with unused Sides licenses cannot be made subject to the payment obligations of Compact section 4.3.2.2(a)(2) if they choose to surrender those licenses rather than accept valid gaming device licenses from the Commission.

Recommendation: The Commission adopt, as its policy, the interpretation of Compact section 4.3.2.2, as follows:

- That the Commission is empowered to conduct gaming device license draws.
- That the Commission direct its staff to notify all compacted tribes that participated in the Sides license draws that the allocations under those draws are ratified by the Commission and that bona fide gaming device licenses are issued by the Commission under Compact section 4.3.2.2, which shall be effective from the date of issuance of the Sides putative licenses to the Tribe. This notice shall also specify that the 12-month time limit for putting the licenses into commercial operation commences upon the date of the notice.
- That the Commission further direct that this notice include an offer permitting tribes that desire to do so to surrender unused putative gaming device licenses within 30 days of receipt of the notice, in exchange for a credit or, if not possible, a refund from the Commission of fees and payments remitted therefor.
- That all such surrendered gaming device licenses be made available as soon as practicable to other compacted tribes in one or more draws to be conducted by the Commission pursuant to Compact section 4.3.2.2.
- That Tribes participating in those draws be invited to jointly participate, through appointed representatives, in the initial review of the applications for gaming device licenses for the purpose of

applying the priorities of Compact section 4.3.2.2(a)(3) and reporting the results to the Commission for its action thereon.